

20-731(L)

20-1009(XAP), 20-1028(XAP)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Cross-Respondent,

—against—

KEY FOOD STORES CO-OPERATIVE, INC., 1525 ALBANY AVE MEAT LLC, HB FOOD CORP., PARAMOUNT SUPERMARKETS INC., RIVERDALE GROCERS LLC, SEVEN SEAS UNION SQUARE, LLC, 100 GREAVES LANE MEAT LLC, JAR 259 FOOD CORP.,

Respondents-Cross-Petitioners.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

**REPLY BRIEF FOR RESPONDENT-CROSS-PETITIONER
KEY FOOD STORES CO-OPERATIVE, INC.**

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PRELIMINARY STATEMENT

The Board's answering brief confirms that the central question on this appeal is whether Key Food was a joint employer of its members' employees due to Key Food's participation in collective bargaining with Local 342. The answer is no, as a matter of law and fact. As to the law, it is undisputed that (1) of the five "immediate control" factors that must be considered, *only* participation in collective bargaining is present here; and (2) participation in collective bargaining alone does not, as a matter of law, constitute the exercise of "immediate control" of another entity's employees.¹

As to the facts, no substantial evidence supports the Board's contention that Key Food exercised "near-absolute control" of the collective bargaining and thereby controlled the terms and conditions of employment. Instead, it is clear that Key Food, together with the members, merely engaged in commonplace multiemployer bargaining. While ignoring substantial, uncontroverted evidence demonstrating the members' active and meaningful role in the bargaining, the Board misstates or mischaracterizes the record, often without citation, in an attempt to exaggerate Key Food's role. Moreover, the Board has no serious answer to Key Food's point that its purported control of the collective bargaining did not

¹ Capitalized terms not defined herein have the same meaning ascribed to them in Key Food's opening brief, which is cited herein as "KF Br." The Board's answering brief is cited herein as "AB."

constitute control of the employees' terms and conditions of employment because, among other reasons, the bargaining did not result in a collective bargaining agreement.

Unable to defeat Key Food's arguments on the merits, the Board argues that the Court lacks jurisdiction under section 10(e) of the Act to consider certain of Key Food's arguments. The Board is wrong, but even if the Court were to accept the Board's position on each discrete argument it challenges, there is no dispute that the Court nevertheless would have jurisdiction to review the Board's joint employer holding and to decline to enforce that portion of its Order.

ARGUMENT

I. THE COURT SHOULD DECLINE TO ENFORCE THE PORTION OF THE ORDER HOLDING THAT KEY FOOD WAS A JOINT EMPLOYER

A. The Holding Is Erroneous As A Matter Of Law

The Order's joint employer holding should not be enforced because it does not have "a reasonable basis in law." *AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995) (discussing applicable standard of review).

The Board does not dispute that, under this Court's precedent, (1) the Board's burden below was to demonstrate that Key Food exercised "immediate control" of its members' unit employees; (2) there are five "immediate control" factors that must be considered; and (3) where the *only* factor present is participation in collective bargaining, there is no joint employer status as a matter

of law. *See, e.g., See AT&T*, 67 F.3d at 451 (participation in collective bargaining “is not enough”), *citing Pulitzer Publ’g Co. v. NLRB*, 618 F.2d 1275, 1280 (8th Cir. 1980) (“[E]ven a very substantial degree of centralized control of labor relations does not in itself determine the joint employer issue.”) (KF Br. at 17-18).²

The foregoing is dispositive of this appeal because it is undisputed that the only “immediate control” factor present in this case is Key Food’s participation in the collective bargaining. And as discussed in Key Food’s opening brief and below, beyond the “immediate control” factors typically considered by this Court, none of the evidence relied on by the Board supports the conclusion that Key Food exercised control of the unit employees, let alone control sufficient to make it a joint employer of those employees. (KF Br. at 24-25)

The Board argues, in effect, that this case is somehow unique because Key Food exercised a greater “level of control over collective bargaining” than was present in the Court’s prior cases. (AB at 54) This argument is meritless. First, the Court’s precedent requiring more than participation in collective bargaining does not turn on the “level of control” of the bargaining. Second, even if Key Food had

² In addition to participation in collective bargaining, the other “immediate control” factors considered in this Circuit are whether the putative joint employer: (1) did the hiring and firing of the employees; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; or (4) directly supervised the employees. *AT&T*, 643 F.3d at 451; (KF at 17) The Board concedes that none of these factors is present here.

exercised “near-absolute control” *of the bargaining* (which it did not), this would not have constituted immediate control *of the member’s employees*. Among other reasons, control of collective bargaining is relevant to the ultimate question – immediate control *of the employees* – only to the extent that control of the bargaining leads to an agreement that sets the employees’ terms and conditions of employment.³ Unlike in cases such as *AT&T* where joint employer status was rejected even though the bargaining resulted in an agreement setting the terms and conditions of employment, no such agreement was reached here. (KF Br. at 19-21; AB at 7-8) For all these reasons, the Court should reject the Board’s invitation to treat this case as an exception to the rule that participation in collective bargaining alone is insufficient to warrant joint employer status.

The Board’s reliance on *G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526 (7th Cir. 1989), is misplaced. There, the putative joint employer, Heileman, negotiated a union contract covering maintenance electricians, and then required Lowry, a subcontractor, to comply with the contract when Lowry hired the electricians. But Heileman’s control went much further, including supervising the

³ The Board inadvertently makes this very point when it argues that “Key Food controls the member-store employees’ terms and conditions of employment because it controls the collective bargaining process *by which those terms are set.*” (AB at 51) (emphasis added) As the Board acknowledges, those terms were *not* set by the failed bargaining process here.

electricians, deciding when they would work overtime, initiating disciplinary actions against them, and generally treating the electricians in the same manner as its own employees. (*Id.* at 1531) Thus, *Heileman* is readily distinguishable because it involved several factors not present here that demonstrated the putative joint employer's control of the employees.

B. The Holding Is Erroneous As A Matter Of Fact

The Order's joint employer holding is erroneous for the further reason that, as the Board's brief confirms, it rests almost entirely on the factual finding that Key Food exercised "near-absolute control" of the collective bargaining. (SA2) On appeal, the Board seeks to sustain this finding, stating in its brief:

Key Food controls the member-store employees' terms and conditions of employment because it controls the collective bargaining process by which those terms are set. Indeed, the record supports the Board's factual finding that Key Food "exercised near-absolute control over negotiations for a common collective bargaining agreement." Key Food not only participated in or attended the collective-bargaining sessions, it controlled them.

(AB at 51, 54) (internal quotation omitted). The evidence, however, does not support the Board's description of the bargaining process, and the isolated snippets of evidence to which it points show nothing more than routine participation by Key Food in the months-long bargaining. Moreover, the Board repeatedly misstates or

mischaracterizes the evidence so as to exaggerate Key Food's role in the bargaining and minimize the members' role.

For example, the Board repeatedly portrays Mr. Catalano, the attorney who represented *both* the members and Key Food in the bargaining, (KF Br. at 9), as the "Key Food" attorney. (*E.g.*, AB at 52, 59) (referring to "*Key Food* attorney Catalano") (emphasis added); (*Id.* at 55) (asserting that "Key Food" acted on behalf of the Member Stores based on Catalano handling certain matters). This is highly misleading and exaggerates Key Food's role in the negotiations. In the same vein is the Board's assertion that for several months "*Key Food* and Local 342 bargained," (AB at 4-5). In fact, as discussed in Key Food's opening brief, and below, the members actively participated in the negotiations, often at the request of Local 342. (KF Br. at 9-12)

The Board also makes numerous false assertions for which it provides no record citation. For example, it contends without citation that Ms. Konzelman of Key Food "spoke for both groups" in the bargaining sessions, meaning for Key Food *and* the members. (AB at 52) Yet her uncontroverted testimony, which the Board ignores, was that she spoke for the two Key Food Stores, while the "members spoke for their stores." (KF Br. at 11; DJA360:22-24) The Board further asserts without citation that "Key Food repeatedly refused to allow Local 342 to bargain with the member stores individually." (AB at 5, 53) Yet it is undisputed

that Key Food member Dan's Supreme, Inc., which initially was part of the Key Food-members bargaining unit, later chose to *separately* negotiate and sign an agreement with Local 342. (KF Br. at 23, n. 16) Similarly, the Board's assertion that Key Food was the "sole signatory" to the collective bargaining agreements reached with the union locals other than Local 342, is incorrect. (AB at 53) The members were signatories as well. (DJA647, 662-63)⁴

The Board's contention that "Konzelman gave the member stores the go-ahead to reduce staffing (including by refusing to hire current employees) and cut wages," (AB at 58), is misleading. Substantial uncontroverted evidence shows that staffing decisions were made *by the members*, (KF Br. at 9-12), and the only evidence cited by the Board for its assertion is an *informational* email from Konzelman to the members, dated October 25, 2015, that was sent to help them with *their* staffing decisions. (DJA870) ("The following is an overview to help you make hiring decisions.") Rather than dictating employment terms to the members, the email merely summarizes the terms that had been agreed to by Key Food and the negotiating members with Locals 338, 464, and 1500, and that they believed had been accepted by Local 342 as well. (KF Br. at 12-13)

⁴ The Board repeats the Order's assertion that Key Food was identified as an "employer" in those agreements, (AB at 53), but it fails to respond to Key Food's point that this hardly is evidence of control given that the agreements covered the employees in the two Key Food Stores, and that the defined term "Employer" includes the members. (KF Br. at 24)

In addition, the Board largely ignores the evidence showing active participation by the members in collective bargaining and that the members, not Key Food, made all decisions concerning which unit employees would be hired by the members and under what terms and conditions. (KF Br. at 9-12) And while arguing that Catalano and Konzelman communicated certain proposals to the Union, (AB at 52), the Board fails to address uncontroverted testimony that the members authorized the proposals made on behalf of Key Food and the members, (DJA281.5; KF Br. at 10), or that Local 342 understood that Key Food had no authority unilaterally to bind the members. (KF Br. at 11, n.9)

That Konzelman may have communicated certain proposals on behalf of Key Food and the members does not, as the Board would have it, support joint employer status. Among other reasons, in multiemployer bargaining, where the employers present a unified front in seeking to negotiate a common agreement, it is hardly unusual or evidence of control of another's employees, for one of the employers to present proposals on behalf of all. *See Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684, 689 (2d Cir. 1995) ("It is the essence of multiemployer bargaining that employers jointly establish and maintain a unified front in dealing with a common union. That goal requires that employers be allowed to meet and agree upon the terms and conditions of employment to be pursued as a unit and to act as though they were a single employer."). If accepted, the Board's argument

would subject to joint employer status every employer who participates in commonplace multiemployer bargaining, which has been “a conspicuous feature of collective bargaining since the very formation of unions.” *Id.* at 690.

The Board does not respond to Key Food’s argument that the Order’s “near-absolute control” finding apparently was based more on contract provisions related to collective bargaining than on Key Food’s conduct during the bargaining itself. (KF Br. at 22) Nor does the Board dispute that that the provisions are irrelevant because, among other reasons, they are unmoored to any *actual exercise* by Key Food of control of the members’ unit employees. (*Id.* at 22-23)⁵

C. The Evidence Relied On By The Board That Is Unrelated To Collective Bargaining Is Irrelevant

In its opening brief, Key Food demonstrates that the evidence referred to in the Order that is unrelated to collective bargaining does not support the conclusion

⁵ The Board cites to its short-lived decision in *Browning Ferris Indus. of Cal., Inc.*, 362 NLRB 1599 (2015) (“*BFI*”), which was issued after the Asset Purchase Agreement and other transaction documents here were signed, and after several collective bargaining sessions had occurred. (KF Br. at 20, n. 14) As discussed in Key Food’s opening brief, the Board overruled *BFI* in its *Hy-Brand* decision and then rejected *BFI*’s joint employer standard in the recently promulgated final Board Rule. (*Id.*) The Board states that “part of the analysis” in *BFI* was whether an employer had a “contractually reserved right to control” the relevant employees. (AB at 51) But the Board does *not* argue that the Order should be enforced against Key Food based on any “reserved right to control,” and it is undisputed that the Order’s joint employer determination was based on the Board’s erroneous finding that Key Food “*exercised* direct and immediate control” over the unit employees, not on any “reserved” right to control them. (SA2) (emphasis added)

that Key Food exercised control of the unit employees. (KF Br. at 24-25) The Board *does not respond* to Key Food's arguments. Instead, it merely repeats the Order's comments about this evidence. (AB at 55-56) Key Food will not burden the Court by repeating here the points made in its opening brief. Suffice it to say that the references to "employer" in the agreements with unions other than Local 342, the Albany Avenue handbook, and the cryptic comment by Mr. Abed that the Board cites as evidence of control of unit employees in twenty-two Member Stores, do not evidence that Key Food exercised immediate control of the unit employees.

II. EVEN IF KEY FOOD WERE A JOINT EMPLOYER, IT IS NOT LIABLE FOR ITS MEMBERS' PURPORTED VIOLATIONS OF THE ACT

At Point II of its opening brief, Key Food argues that even if this Court were to uphold the Board's joint employer determination, Key Food would not be liable for its members' purported violations of the Act, which Key Food did not direct and in which it did not participate. The Board offers no substantive response, thereby conceding the merits of Key Food's argument.

III. THE COURT HAS JURISDICTION TO HEAR ALL OF KEY FOOD'S ARGUMENTS

The Board argues that, under Section 10(e) of the Act, 29 U.S.C. §160(e), the Court lacks jurisdiction to hear certain Key Food arguments.⁶ Notably, the Board does not contest the Court's jurisdiction to hear Key Food's central argument, *i.e.*, that it did not exercise immediate control of the members' employees. Thus, regardless of how the Court resolves the Board's discrete challenges, it may consider the "immediate control" argument, which alone requires non-enforcement of the Order's joint employer holding.

A. Key Food's Exceptions And Briefs Filed With The Board Encompass Its "Immediate Control" Arguments In This Court

In its "exceptions" to the ALJ Decision that Key Food filed with the Board, it specifically objected to the joint employer holding and, in particular, the finding that Key Food "exercised direct and immediate control over the employees' terms and conditions of employment." (DJA1494:¶¶A, F)⁷ In addition, Key Food's

⁶ Section 10(e) states, in relevant part, that "[n]o objection that has not been urged before the Board . . . shall be considered by the [appellate] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

⁷ Paragraph A of Key Food's exceptions objects to "The ALJ's Determination that Respondent Key Food Is a Joint Employer with the Other Respondents." (DJA1494) This objection lists six separate subparts. In subpart A.2., Key Food objected to "[t]he finding/conclusion that . . . Respondents jointly exercised direct and immediate control over employees' terms and conditions of employment." And in subpart A.4., Key Food objected to the ALJ's finding that "the record belies

opening brief filed with the Board (together with Key Food's exceptions, the "Objection") focused on the lack of evidence that it controlled the terms and conditions of employment of the unit employees. (DJA1523-27) The Objection therefore encompassed the arguments that Key Food now makes to this Court, all of which involve the absence of evidence that Key Food exercised immediate control of the members' employees.

The cases cited by the Board are readily distinguishable. In *KBI Sec. Service, Inc. v. NLRB*, 91 F.3d 291, 294 (2d Cir. 1996), KBI filed *no objection* to the ALJ's determination that KBI impermissibly interrogated employees. In *Woelke & Romeo Framing Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982), the petitioner failed to file an objection to the ALJ's finding that it violated section 8(b)(4)(A) of the Act. Here, in order to fit within those cases, Key Food would have had to fail to object to the ALJ's joint employer determination. Instead, in its Objection, Key Food specifically objected the joint employer determination, and to the ALJ's finding that Key Food exercised "direct and immediate control" of the unit employees' terms and conditions of employment. (DJA1494:¶¶A.1, 2) Therefore, all of Key Food's arguments to this Court concerning its failure to exercise "immediate control" of the members' employees, are easily encompassed by the Objection.

Respondents' position that Respondent Key Food had no involvement in the personnel decisions of stores it did not own itself." (DJA1495:¶A.4)

Courts have rejected jurisdiction where an objection, unlike the Objection here, was so generic as to provide no meaningful notice of the nature of the objection. *See, e.g., Marshall Field & Co. v. NLRB*, 318 U.S. 253 (1943) (objection that the examiner “erred in making each and every recommendation” was too general); *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 459-60 (1st Cir. 2005) (objection that remedies were “not supported by the evidence or by the law” was too general). *But see Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1090 (D.C. Cir. 2016) (court had jurisdiction to hear challenge to remedy where petitioner had urged only a “vague” objection that the “remedy violated ‘established Board law and policy.’”). The Objection here, which expressly objected to the joint employer holding, the ALJ’s finding that Key Food exercised “direct and immediate control” of the terms and conditions of employment, (DJA1494:¶A.2), and other “control” findings, was far more specific than the objections urged in these cases.

B. The Court Has Jurisdiction To Consider Each Key Food Argument

The Board first contends that the Court may not hear Key Food’s argument “that joint-employer status was precluded because the parties did not reach an agreement.” (AB at 56) As an initial matter, the Board misstates Key Food’s argument, which is not that the failure to reach a collective bargaining agreement “precludes” joint employer status, but that it *confirms* that the Board’s core

position – that Key Food controlled the unit employees by participating in collective bargaining – is meritless. Thus, Key Food’s argument is easily within the scope of the Objection. Moreover, at a minimum, Key Food’s argument is properly responsive to the Board’s affirmative argument that Key Food “exercised direct and immediate control over essential terms and conditions of employment” because it allegedly “exercised near-absolute control over negotiations for a common collective bargaining agreement.” (AB at 51, 54)

The Board next seeks to preclude a purported argument by Key Food “that the Board should not have considered the terms of the Asset Purchase Agreement.” (AB at 56) Here again, the Board misstates Key Food’s argument, which is that the APA and the other transaction documents do not support the Board’s finding that Key Food exercised control of the members’ employees. (KF Br. at 22-23) In all events, Key Food expressly argued to the Board that the “APAs and other transaction documents . . . make clear . . . that [the Members] have at all times had sole control of the former A&P employees.” (DJA 1525) Based on this, and its exceptions, Key Food’s argument to this Court is easily within the scope of the Objection.

The Board next argues that the Court may not consider Key Food’s purported argument that “only five factors are relevant to the joint employer analysis or that all of those factors must be present.” (AB at 56) Again the Board

misstates Key Food's argument, which is not that *all* five factors identified in the Court's precedent must be present, but that if participation in collective bargaining is the only factor (as it is here), that is not enough to demonstrate the requisite "immediate control." This argument is well within the scope of the Objection. Moreover, the Board's position lacks merit because it essentially amounts to challenge to this Court's jurisdiction *to apply its own precedent* to an issue – joint employer status – that even the Board does not argue is beyond the Court's jurisdiction.

Finally, contrary to the Board's position, the Court may hear Key Food's argument (at Point II of its opening brief) that it did not participate in the members' alleged violations, and therefore is not liable for those violations, even if this Court were to decide that Key Food was a joint employer. This is a purely legal argument based on the same "lack of control" facts that underlie Key Food's argument that it was not a joint employer. (KF Br. at 27); *see Int'l Ladies' Garment Workers' Union AFL-CIO v. NLRB*, 339 F.2d 116, 126, n.1 (2d Cir. 1964) (union's failure to raise issue before the Board did not preclude it from raising the issue in court where the issue was similar to another issue, "presents essentially a legal question, all the necessary information is before this Court and the Board's position is known.").

CONCLUSION

The Court should deny enforcement of the Order against Key Food and reverse the Order insofar as it holds that Key Food was a joint employer. If the Court upholds the joint employer holding, it should nevertheless hold that Key Food is not liable for any violations of the Act by its members.

Dated: November 12, 2020

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record certifies that the foregoing reply brief uses a proportionally-spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 3,784 words according to the word count provided by Microsoft Word 2016 word processing.

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